



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[REG-134122-15]

RIN 1545-BN09

Special Enrollment Examination User Fee for Enrolled Agents

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking, notice of proposed rulemaking, and notice of public hearing.

SUMMARY: This document withdraws a proposed regulation relating to the user fee for the special enrollment examination to become an enrolled agent. This document also proposes a new regulation to increase the user fee for the examination to recover the cost to the IRS of overseeing the administration of the examination. The withdrawal and proposal affect individuals taking the enrolled agent special enrollment examination.

This document also contains a notice of public hearing on the new proposed regulation.

DATES: Written or electronic comments must be received by **[INSERT DATE 60 DAYS**

AFTER PUBLICATION IN THE FEDERAL REGISTER]. Requests to speak and

outlines of topics to be discussed at the public hearing scheduled for December 29,

2016, must be received by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE**

FEDERAL REGISTER].

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-134122-15), room 5203,

Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-134122-15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC 20224, or sent via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-134122-15). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning this proposed regulation, Jonathan R. Black, (202) 317-6845 (not a toll-free number); concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Regina Johnson, (202) 317-6901 (not a toll-free number); concerning cost methodology, Eva Williams, (202) 803-9728 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

A. Enrolled Agents and the Special Enrollment Examination

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. Pursuant to 31 U.S.C. 330, the Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230).

Section 10.4(a) of Circular 230 authorizes the IRS to grant status as enrolled agents to individuals who demonstrate special competence in tax matters by passing a

written examination (Enrolled Agent Special Enrollment Examination (EA-SEE)) administered by, or under the oversight of, the IRS and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. There were a total of 51,755 active enrolled agents as of September 1, 2016.

Starting in 2006, the IRS engaged the services of a third-party contractor to develop and administer the EA-SEE. The EA-SEE is composed of three parts, which are offered in a testing period that begins each May 1 and ends the last day of the following February. The EA-SEE is not available in March and April, during which period it is updated to reflect recent changes in the relevant law. More information on the EA-SEE, including content, scoring, and how to register, can be found on the IRS website at www.irs.gov/tax-professionals/enrolled-agents. The IRS Return Preparer Office (RPO) oversees the administration of the EA-SEE.

B. User Fee Authority

The Independent Offices Appropriations Act (IOAA) (31 U.S.C. 9701) authorizes each agency to promulgate regulations establishing the charge for services provided by the agency (user fees). The IOAA provides that these user fee regulations are subject to policies prescribed by the President and shall be as uniform as practicable. Those policies are currently set forth in the Office of Management and Budget (OMB) Circular A-25 (OMB Circular), 58 FR 38142 (July 15, 1993).

The IOAA states that the services provided by an agency should be self-sustaining to the extent possible. 31 U.S.C. 9701(a). The OMB Circular states that agencies that provide services that confer special benefits on identifiable recipients

beyond those accruing to the general public are to establish user fees that recover the full cost of providing those services. The OMB Circular requires that agencies identify all services that confer special benefits and determine whether user fees should be assessed for those services.

Agencies are to review user fees biennially and update them as necessary to reflect changes in the cost of providing the underlying services. During this biennial review, an agency must calculate the full cost of providing each service, taking into account all direct and indirect costs to any part of the U.S. government. The full cost of providing a service includes, but is not limited to, salaries, retirement benefits, rents, utilities, travel, and management costs, as well as an appropriate allocation of overhead and other support costs associated with providing the service.

An agency should set the user fee at an amount that recovers the full cost of providing the service unless the agency requests, and the OMB grants, an exception to the full-cost requirement. The OMB may grant exceptions only where the cost of collecting the fees would represent an unduly large part of the fee for the activity, or where any other condition exists that, in the opinion of the agency head, justifies an exception. When the OMB grants an exception, the agency does not collect the full cost of providing the service and therefore must fund the remaining cost of providing the service from other available funding sources. When the OMB grants an exception, the agency subsidizes the cost of the service to the recipients of reduced-fee services even though the service confers a special benefit on those recipients who should otherwise be required to pay the full costs of receiving that benefit as provided for by the IOAA

and the OMB Circular.

C. The EA-SEE User Fee

As discussed above, Circular 230 §10.4(a) provides that the IRS will grant enrolled agent status to an applicant if the applicant, among other things, demonstrates special competence in tax matters by written examination. The EA-SEE is the written examination that tests special competence in tax matters for purposes of that provision, and an applicant must pass all parts of the EA-SEE to be granted enrolled agent status through written examination. The IRS confers a benefit on individuals who take the EA-SEE beyond those that accrue to the general public by providing them with an opportunity to demonstrate special competence in tax matters by passing a written examination and therefore satisfying one of the requirements for becoming an enrolled agent under Circular 230 §10.4(a). Because the opportunity to take the EA-SEE is a special benefit, the IRS charges a user fee to take the examination.

Pursuant to the guidelines in the OMB Circular, the IRS has calculated its cost of providing examination services under the enrolled agent program. The proposed user fee will be implemented under the authority of the IOAA and the OMB Circular and will recover the full cost of overseeing the program. The current user fee is \$11 to take each part of the EA-SEE. The contractor who administers the EA-SEE also charges individuals taking the EA-SEE an additional fee for its services. For the May 2016 to February 2017 testing period, the contractor's fee is \$98 for each part of the EA-SEE. For the March 2017 to February 2019 testing periods, the contractor's fee will be \$100.94. For the March 2019 to February 2020 testing period, the contractor's fee will

be \$103.97. The fee charged by the contractor is fixed by the current contract terms and therefore may not be reduced or renegotiated at this time. The contract will expire on February 29, 2020. The contract was subject to public procurement procedures, and there were no tenders that were more competitive.

The IRS has not increased the EA-SEE user fee since 2006, when it published the existing user fee regulation. Since that time, the costs incurred by the IRS to implement the EA-SEE program have increased. The IRS has recently gathered sufficient data to reliably estimate the IRS's current costs in implementing the EA-SEE program as described in the costing analysis contained in this preamble.

The increased costs require an increase in the EA-SEE user fee. The increased costs are primarily attributable to the following: (1) the cost for background checks required under Publication 4812, "Contractor Security Controls," for individuals working at the contractor's testing centers increased by \$289,000 per year; (2) the IRS estimates that the contractor will administer 12,000 fewer parts of the EA-SEE per year than the estimated 34,000 used to calculate the \$11 fee, and the total costs are therefore being recovered from fewer individuals; and (3) the IRS's costs of verifying the contractor's compliance with the information technology security requirements necessary to protect the personally identifiable information of individuals taking the EA-SEE have increased, because Publication 4812 has strengthened those requirements.

In addition, the scope of the work performed to oversee the contract has expanded beyond what it was in 2006. The proposed fee more accurately accounts for the time and personnel necessary to oversee the development and administration of the

EA-SEE and to ensure the contractor complies with the terms of its contract. The IRS's costs for oversight now include costs associated with: (1) review and approval of materials used by the contractor in developing the EA-SEE; (2) review of surveys of existing enrolled agents, which help to determine the topics to be covered in the EA-SEE; (3) composition of potential EA-SEE questions in coordination with the contractor's external tax law experts; (4) Office of Chief Counsel review and revision of the potential questions for legal accuracy; and (5) analysis of the answers and raw scores of a testing population to determine what should be a passing score.

Further, the IRS's personnel ensure the contractor's compliance with its contract by reviewing the work of the contractor using an annual Work Breakdown Structure—a project management tool—and reviewing and verifying that the contractor is in compliance with its Quality Assurance Plan regarding customer satisfaction and accuracy. The IRS incurs additional costs associated with resolution of test-related issues such as cheating incidents, appeals regarding scores, refund requests, and customer service complaints that are not resolved at the contractor level.

Taking into account the full amount of these costs, the user fee for the EA-SEE is proposed to be increased to \$81 per part as of the testing period that begins on May 1, 2017. The IRS does not intend to subsidize any of the cost of making the EA-SEE available to examinees, and is not applying for an exception to the full-cost requirement from the OMB.

D. Previous EA-SEE NPRM is Withdrawn

On January 26, 2016, a notice of proposed rulemaking (REG-134122-15) proposing an increase to the EA-SEE user fee was published in the **Federal Register** (81 FR 4221). The January 26, 2016 notice of proposed rulemaking proposed to increase the EA-SEE user fee to \$99 per part. The IRS has redetermined the user fee and now proposes to increase the user fee to \$81 per part. The January 26, 2016 notice of proposed rulemaking is withdrawn.

E. Calculation of User Fees Generally

User fee calculations begin by first determining the full cost for the service. The IRS follows the guidance provided by the OMB Circular to compute the full cost of the service, which includes all indirect and direct costs to any part of the U.S. government, including, but not limited to, direct and indirect personnel costs, physical overhead, rents, utilities, travel, and management costs. The IRS's cost methodology is described below.

Once the total amount of direct and indirect costs associated with a service is determined, the IRS follows the guidance in the OMB Circular to determine the costs associated with providing the service to each recipient, which represents the average per unit cost of that service. This average per unit cost is the amount of the user fee that will recover the full cost of the service.

The IRS follows generally accepted accounting principles (GAAP), as established by the Federal Accounting Standards Advisory Board (FASAB) in calculating the full cost of providing services. The FASAB Handbook of Accounting Standards and Other Pronouncements, as amended, which is available at

http://files.fasab.gov/pdf/files/2015_fasab_handbook.pdf, includes the Statement of Federal Financial Accounting Standards No. 4: Managerial Cost Accounting Concepts and Standards for the Federal Government (SFFAS No.4). SFFAS No. 4 establishes internal costing standards under GAAP to accurately measure and manage the full cost of federal programs. The methodology described below is in accordance with SFFAS No. 4.

1. Cost center allocation

The IRS determines the cost of its services and the activities involved in producing them through a cost accounting system that tracks costs to organizational units. The lowest organizational unit in the IRS's cost accounting system is called a cost center. Cost centers are usually separate offices that are distinguished by subject-matter area of responsibility or geographic region. All costs of operating a cost center are recorded in the IRS's cost accounting system and allocated to that cost center. The costs allocated to a cost center are the direct costs for the cost center's activities as well as all indirect costs, including overhead, associated with that cost center. Each cost is recorded in only one cost center.

2. Determining the per-unit cost

To establish the per-unit cost, the total cost of providing the service is divided by the volume of services provided. The volume of services provided includes both services for which a fee is charged as well as subsidized services. The subsidized services are those where the OMB has approved an exception to the full cost requirement, for example, to charge a reduced fee to low-income taxpayers. The

volume of subsidized services is included in the total volume of services provided to ensure that the IRS, and not those who are paying full cost, subsidizes the cost of the reduced-full cost services.

3. Cost estimation of direct labor and benefits

Not all cost centers are fully devoted to only one service for which the IRS charges a user fee. Some cost centers work on a number of different services. In these cases, the IRS estimates the cost incurred in those cost centers attributable to the service for which a user fee is being calculated by measuring the time required to accomplish activities related to the service and estimating the average time required to accomplish these activities. The average time required to accomplish these activities is multiplied by the relevant organizational unit's average labor and benefits costs per unit of time to determine the labor and benefits costs incurred to provide the service. To determine the full cost, the IRS then adds an appropriate overhead charge as discussed below.

4. Calculating overhead

Overhead is an indirect cost of operating an organization that cannot be immediately associated with an activity that the organization performs. Overhead includes costs of resources that are jointly or commonly consumed by one or more organizational unit's activities but are not specifically identifiable to a single activity.

These costs can include:

- General management and administrative services of sustaining and supporting organizations

- Facilities management and ground maintenance services (security, rent, utilities, and building maintenance)
- Procurement and contracting services
- Financial management and accounting services
- Information technology services
- Services to acquire and operate property, plants and equipment
- Publication, reproduction, and graphics and video services
- Research, analytical, and statistical services
- Human resources/personnel services
- Library and legal services

To calculate the overhead allocable to a service, the IRS first calculates the Corporate Overhead rate and then multiplies the Corporate Overhead rate by the direct labor and benefits costs determined as discussed above. The IRS calculates the Corporate Overhead rate annually based on cost elements underlying the Statement of Net Cost included in the IRS Annual Financial Statements, which are audited by the Government Accountability Office. The Corporate Overhead rate is the ratio of the sum of the IRS's indirect labor and benefits costs from the supporting and sustaining organizational units—those that do not interact directly with taxpayers—and all non-labor costs to the IRS's labor and benefits costs of its organizational units that interact directly with taxpayers.

The Corporate Overhead rate of 65.85 percent for costs reviewed during FY 2015 was calculated based on FY 2014 costs as follows:

Indirect Labor and Benefits Costs		\$1,693,339,843
Non-Labor Costs	+	<u>\$2,832,262,970</u>
Total Indirect Costs		\$4,525,602,813
Direct Labor and Benefits Costs	÷	<u>\$6,872,934,473</u>
Corporate Overhead Rate		<u>65.85%</u>

F. Calculation of the EA-SEE User Fee

1. Cost Estimate

The RPO is the only organization involved in overseeing the administration of the EA-SEE. The cost centers within the RPO support multiple programs and are not solely dedicated to the EA-SEE. The RPO, however, has a staff of only ten people who devote time to oversee the administration of the EA-SEE program. Because there are only a few individuals who directly handle oversight of the EA-SEE, the IRS projected the estimated costs of direct labor and benefits based on the actual labor and benefits of these specific individuals reduced to reflect the percentage of time each individual spends overseeing the EA-SEE program. The RPO's managers are able to estimate the percentage of time these employees devote to overseeing the EA-SEE program based on their knowledge of actual program assignments. Of the ten people, eight devote seventy-five percent or more of their time to EA-SEE-related activities, and two devote approximately ten percent of their time to EA-SEE-related activities.

The baseline for the labor and benefits estimate was the actual labor and benefits for the ten personnel for Fiscal Year 2015. From this baseline, the IRS estimated the direct labor and benefits costs over the next three years using an inflation factor for Fiscal Years 2016, 2017, and 2018. The IRS used a three year projection because the increase in future labor and benefits costs are reliably predictable representations of the actual costs that will be incurred by the RPO. These estimated direct labor and benefits costs were then reduced by the percentage of time each of the ten individuals devoted to the EA-SEE program and are set out in the following table:

<u>Year</u>	<u>Estimated Direct Labor and Benefits Costs</u>
2016	\$912,180
2017	\$921,302
2018	<u>\$930,515</u>
Total	<u><u>\$2,763,997</u></u>

The total estimated direct labor and benefits costs for the three years is \$2,763,997. After estimating the direct total labor and benefits, the IRS applied the Fiscal Year 2015 Corporate Overhead rate of 65.85 percent to the estimated direct labor and benefits to calculate indirect costs of \$1,820,092, for a total labor and benefits costs for the three year period of \$4,584,089.

The EA-SEE program incurs a cost for required background investigations performed on the employees of the contractor that administers the EA-SEE. The background investigations are not performed by the RPO, so the cost of the background investigations is not included in the direct labor and benefits costs calculated above for

the ten RPO employees. The contractor administers the EA-SEE at approximately 260 domestic locations, and each employee at these locations must undergo a background investigation in order to administer the EA-SEE. The contractor's employees are typically short-term or seasonal workers, so the IRS must perform background investigations on new employees on a continuing basis. Where permissible, the IRS will piggyback on previously completed background investigations. Typically, the IRS may rely on another government agency's background investigation for up to two years from the date the prior investigation was completed. However, investigations performed by other organizations for the contractor's employees generally cannot supplant the need for the IRS to perform its own investigations because the IRS's background investigations include, among other elements, federal tax compliance checks, which are not necessarily part of investigations performed by other organizations. The EA-SEE is the only exam that the contractor administers on behalf of the IRS, so the contractor's new hires typically have not undergone a background investigation performed by the IRS prior to being hired.

The IRS estimated the cost for background investigations using historical costs from the years 2012 through 2014. The IRS cannot forecast the future costs of background investigations with the same certainty as it can forecast labor and benefits, and it therefore used a historical three year average to estimate the background investigation costs. The IRS did not include the historical background investigation cost from 2015 in the historical average because 2014 was the most recent year for which information was available at the time the IRS initiated this project to update the user fee.

The cost for background investigations for the contractor was an average of \$289,000 per year for the years 2012 through 2014, calculated as follows: The costs of all background investigations incurred on behalf of the RPO were \$294,000, \$259,000, and \$409,000 in 2012, 2013, and 2014, respectively, for a \$321,000 yearly average. Ninety percent of these background investigations were for the contractor who administers the EA-SEE. The other ten percent of these background investigations did not relate to the EA-SEE, so the IRS multiplied the \$321,000 yearly average cost of background investigations by the ninety percent allocable to the contractor. The resulting average annual cost for EA-SEE background investigations for each year of the three year period was \$289,000, with a total cost of \$867,000. The IRS used the historical cost totals as the estimate of the 2016, 2017, and 2018 background investigations costs. Because background investigation costs may not increase as predictably as labor and benefits costs, the IRS did not apply an inflation factor.

The calculation of the total cost of the EA-SEE program for 2016 through 2018 is below:

Direct Labor and Benefits	\$2,763,997
Corporate Overhead at 65.85%	<u>\$1,820,092</u>
Subtotal	\$4,584,089
Background Checks	<u>\$867,000</u>
Total EA-SEE Cost	<u>\$5,451,089</u>

2. Volume of Examinations

The number of examinations provided during Fiscal Years 2012, 2013, and 2014

were 23,985, 23,110, and 20,180, respectively. As with the cost of background investigations, the number of examinations administered in 2015 was not available at the time this project was initiated, and the IRS therefore did not include it in the calculation. The total number of examinations for the three years was 67,275. The IRS used this historical three-year volume to estimate the number of examinations it expects to provide in 2016, 2017, and 2018.

3. Unit Cost Per Examination

The IRS divided the three year total EA-SEE program costs by the total volume of examinations expected over the same three year period to determine a unit cost per examination of \$81.

Total EA-SEE Cost	\$5,450,089
Volume	<u>÷ 67,275</u>
Unit Cost	<u><u>\$81</u></u>

Special Analyses

Certain Treasury regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It is hereby certified that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. This certification is based on the information that follows. The user fee primarily affects individuals who take the enrolled agent examination, many of whom may not be classified as small entities under the Regulatory Flexibility Act. Therefore, a substantial number of small entities is not likely

to be affected. Further, the economic impact on any small entities affected would be limited to paying the \$70 difference in cost per part between the proposed \$81 user fee and the existing \$11 user fee, which is unlikely to present a significant economic impact. Moreover, the total economic impact of this proposed regulation would be approximately \$1.57 million, which is the product of the approximately 22,425 parts of the EA-SEE administered annually and the \$70 increase in the fee. Accordingly, the proposed rule is not expected to have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any comments that are submitted timely to the IRS as prescribed in the preamble under the ADDRESSES section. The Treasury Department and the IRS request comments on all aspects of the proposed regulation. All comments submitted will be made available at www.regulations.gov or upon request.

A public hearing has been scheduled for December 29, 2016, beginning at 10:00 AM in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, D.C. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the

immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. A period of 10 minutes will be allocated to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of this regulation is Jonathan R. Black of the Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG-134122-15) that was published in the **Federal Register** on January 26, 2016, (81 FR 4221) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 300 is proposed to be amended as follows:

PART 300—USER FEES

Paragraph 1. The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

Par. 2. Section 300.4 is amended by revising paragraphs (b) and (d) to read as follows:

§ 300.4 Enrolled agent special enrollment examination fee.

* * * * *

(b) Fee. The fee for taking the enrolled agent special enrollment examination is \$81 per part, which is the cost to the government for overseeing the development and administration of the examination and does not include any fees charged by the administrator of the examination.

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(d) Applicability date. This section applies on and after the date of publication of a Treasury decision adopting this rule as a final regulation in the **Federal Register**.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.